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In The
Supreme Court of the United States

LAKHDAR BOUMEDIENE, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

KHALED A.F. AL ODAH, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF FEDERAL COURTS AND INTERNATIONAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS (GENEVA ENFORCEABILITY)

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. AS *HAMDAN* RECOGNIZED, THE GENEVA CONVENTIONS CAN BE ENFORCED BY THE GUANTÁNAMO DETAINEES 5

II. SECTION 5 OF THE MILITARY COMMISSIONS ACT DOES NOT APPLY TO THESE CASES 13

III. TO THE EXTENT THAT SECTION 5 APPLIES TO THESE CASES AND PRECLUDES CONSIDERATION OF PETITIONERS' TREATY-BASED CLAIMS, IT IS UNCONSTITUTIONAL 23

CONCLUSION 30

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Ableman v. *Booth*, 62 U.S. (21 How.) 506 (1859) 5

Ashwander v. *TVA*, 297 U.S. 288 (1936) 18

Bannerman v. *Snyder*, 325 F.3d 722 (6th Cir. 2003) 7

Bismullah v. *Gates*, No. 06-1197, 2007 WL 2067938 (D.C. Cir. July 20, 2007) 25

Boumediene v. *Bush*, 476 F.3d 981 (D.C. Cir.), *cert. granted*, 127 S. Ct. 3078 (2007) (No. 06-1195) 17

Brown v. *Allen*, 344 U.S. 443 (1953) 24

Carneal v. *Banks*, 23 U.S. (10 Wheat.) 181 (1825) 8

Chew Heong v. *United States*, 112 U.S. 536 (1884) 2, 8

Cook v. *United States*, 288 U.S. 102 (1933) 8, 23

Elk Grove Unified Sch. Dist. No. 1 v. *Newdow*, 542 U.S. 1 (2004) 18

Ex parte Randolph, 20 F. Cas. 242 (C.C.D. Va. 1833) (No. 11,558) (Marshall, C.J.) 18

Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1869) 19

Felker v. *Turpin*, 518 U.S. 651 (1996) 5, 24

Field v. *Mans*, 516 U.S. 59 (1995) 16

Garza v. *Lappin*, 253 F.3d 918 (7th Cir. 2001) 7

Hain v. *Gibson*, 287 F.3d 1224 (10th Cir. 2002) 7

Hamdan v. *Rumsfeld*, 126 S. Ct. 2749 (2006) ..... *passim*

Hamdan v. *Rumsfeld*, 464 F. Supp. 2d 9 (D.D.C. 2006) 2

TABLE OF AUTHORITIES – Continued

Page

Hamdi v. *Rumsfeld*, 542 U.S. 507 (2004) ..... *passim*

Hooper v. *California*, 155 U.S. 648 (1895) 18

Hughes Aircraft Co. v. *United States ex rel. Schumer*, 520 U.S. 939 (1997) 4

INS v. *St. Cyr*, 533 U.S. 289 (2001) 18, 19, 23, 24

Kolovrat v. *Oregon*, 366 U.S. 187 (1961) 8

Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994) 14

Legal Servs. Corp. v. *Velazquez*, 531 U.S. 533 (2001) 27

Lindh v. *Murphy*, 521 U.S. 320 (1997) 3, 16, 17

Loving v. *Virginia*, 517 U.S. 748 (1996) 28

Maiorano v. *Balt. & Ohio R.R. Co.*, 213 U.S. 268 (1909) 7

Miller v. *French*, 530 U.S. 327 (2000) 28

Moodie v. *The Ship Phoebe Anne*, 3 U.S. (3 Dall.) 319 (1796) 8

Mossman v. *Higginson*, 4 U.S. (4 Dall.) 12 (1800) 18

Murray v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) 20, 21

Nelson v. *Campbell*, 541 U.S. 637 (2004) 25

Ogbudimkpa v. *Ashcroft*, 342 F.3d 207 (3d Cir. 2003) 8

Orr v. *Hodgson*, 17 U.S. (4 Wheat.) 453 (1819) 8

Owings v. *Norwood's Lessee*, 9 U.S. (5 Cranch) 344 (1809) 7

Patsone v. *Pennsylvania*, 232 U.S. 138 (1914) 8

TABLE OF AUTHORITIES – Continued

Page

Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) 4, 27, 28

Preiser v. *Rodriguez*, 411 U.S. 475 (1973) 25

Republic of Austria v. *Altman*, 541 U.S. 677 (2004) 14

Robertson v. *Seattle Audubon Soc'y*, 503 U.S. 429 (1992) 28

Sanchez-Llamas v. *Oregon*, 126 S. Ct. 2669 (2006) 9

Schiavo ex rel. Schindler v. *Schiavo*, 404 F.3d 1270 (11th Cir. 2005) 29

Smith v. *Bennett*, 365 U.S. 708 (1961) 7

Swain v. *Pressley*, 430 U.S. 372 (1977) 4, 24, 25

Tarble's Case, 80 U.S. (13 Wall.) 397 (1872) 5

The Prize Cases, 67 U.S. (2 Black) 635 (1863) 21

Trans World Airlines, Inc. v. *Franklin Mint Corp.*, 466 U.S. 243 (1984) 11, 23

United States v. *Klein*, 80 U.S. (13 Wall.) 128 (1872) 4, 27, 28, 29, 30

United States v. *Laverty*, 26 F. Cas. 875 (D. La. 1812) (No. 15,569a) 5

United States v. *Rauscher*, 119 U.S. 407 (1886) 8

Weinberger v. *Rossi*, 456 U.S. 25 (1982) 21

Wesson v. *U.S. Penitentiary*, 305 F.3d 343 (5th Cir. 2002) 7

Wildenhus's Case, 120 U.S. 1 (1887) 5

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND CONSTITUTIONAL PROVISIONS

10 U.S.C. § 948b(f) 12

10 U.S.C. § 948b(g) 13

War Crimes Act, 28 U.S.C. § 2441 ..... 11, 14

28 U.S.C. § 2241(c) 4, 9, 23

Authorization for the Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001) 10, 11

Detainee Treatment Act ("DTA"), Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2680, 2739-44 (2005) ..... *passim*

Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385, 385 5

Judiciary Act of 1789, ch. 20, 1 Stat. 73 6

Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 ..... *passim*

U.S. CONST. art. I, § 9, cl. 2 ..... *passim*

U.S. CONST. art. II, § 2, cl. 1 20

U.S. CONST. art. II, § 3 22

U.S. CONST. art. VI, cl. 2 ..... 7, 23

OTHER AUTHORITIES

Amicus Brief of Law Professors Louis Henkin et al. at 9-13, *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184) 8

WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980) 5

ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY (2001) 5

TABLE OF AUTHORITIES – Continued

Page

Jonathan L. Hafetz, Note, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509 (1998) 6

Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions*, 90 CORNELL L. REV. 97 (2004) 7, 22

Lawrence G. Sager, Klein's *First Principle: A Proposed Solution*, 86 GEO. L.J. 2525 (1998) 29

David Sloss, *When Do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue in* Hamdan *and* Sanchez-Llamas, 45 COLUM. J. TRANSNAT'L L. 20 (2006) 8, 9

Transcript of Oral Argument at 49, *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749 (2006), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-184.pdf 18

Carlos Manuel Vázquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 AM. J. INT'L L. 73 (2007) 12, 13, 29

INTERESTS OF *AMICI CURIAE*[1]

Amici curiae respectfully submit this brief to address the question whether the treaty rights Petitioners assert are enforceable in the courts of the United States. *Amici* are law professors with expertise in the federal courts and international law. They file this brief to provide the Court with an historical overview of the enforceability of treaty-based rights in U.S. courts, and a more in-depth argument concerning the applicability *vel non* of section 5 of the Military Commissions Act of 2006.[2]

SUMMARY OF ARGUMENT

One of the central questions raised by these petitions is the extent to which Petitioners may use the writ of habeas corpus to enforce their rights under the 1949 Geneva Conventions.[3] Throughout the Republic's history, the writ of habeas corpus has been available for treaty-based claims

[1] The parties' letters of consent to the filing of this brief *amici curiae* have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of the Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than *amici* or their counsel, has made a monetary contribution for preparing or submitting this brief. This brief was prepared with the *pro bono* assistance of Alan Tauber, Esq., a Ph.D. candidate at the University of South Carolina.

[2] For a full list of *amici*, see the Appendix to this brief.

[3] Throughout this brief, *amici* use the term "Geneva Conventions" as shorthand for the four international humanitarian treaties signed at Geneva on August 12, 1949, the third of which relates to prisoners of war, and the fourth of which relates to the protection of civilian persons during wartime. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, § 5(b), 120 Stat. 2600, 2632 (defining and citing the four conventions).

such as those invoked by Petitioners. This is so even if, as Respondents maintain, the Geneva Conventions are "non-self-executing." This Court has sanctioned the use of habeas corpus to enforce rights conferred by a treaty that did not itself provide a cause of action. *See, e.g.*, *Chew Heong* v. *United States*, 112 U.S. 536 (1884). Moreover, as this Court recognized in *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion), and *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749 (2006), the Geneva Conventions are an integral part of the laws of war and are therefore indispensable in considering whether the government has the authority to detain Petitioners.

Although *Hamdi* and *Hamdan* support the enforceability of the Geneva Conventions in these cases, both decisions predate section 5 of the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600, which provides:

> No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.

Id. § 5(a), 120 Stat. at 2631. Thus, these cases raise the additional question whether Petitioners may enforce their rights under the Geneva Conventions notwithstanding section 5 of the MCA.[4]

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[4] *Amici* assume, for the sake of argument, that section 7 of the MCA does not divest the courts of jurisdiction over these cases, or that it is unconstitutional to the extent that it does.

Section 5 does not apply to these cases. As a general matter, section 5 does not provide for its applicability to pending cases. Congress's silence is particularly telling, especially since Congress included effective date language in sections 6 and 7 of the MCA. Thus, the "negative inference" principle identified in *Lindh* v. *Murphy*, 521 U.S. 320 (1997), and relied upon in *Hamdan*, counsels against reading section 5 so as to apply here. Indeed, *Hamdan* based its holding that section 1005(e)(1) of the Detainee Treatment Act of 2005 ("DTA") did not apply to cases pending on the date of the DTA's enactment on this precise distinction. Relying on "ordinary principles of statutory construction," *Hamdan* concluded that the inclusion of specific language to apply sections 1005(e)(2) and (e)(3) to pending cases compelled the conclusion that section 1005(e)(1), for which there was no similar language, did not apply. The same is true here. Such a reading of section 5 of the MCA is bolstered by the constitutional avoidance canon, given the grave constitutional questions that would arise from applying section 5 to pending cases.

Even if section 5 generally applies to pending cases, there remains the specific question of whether Petitioners are invoking the Geneva Conventions "as a source of rights" within the meaning of section 5. Although Petitioners are invoking the Geneva Conventions in support of their claims, they are not relying upon the Geneva Conventions "as a source of rights," as that phrase is used in the MCA. To the contrary, the central relevance of the Geneva Conventions is as part of the laws of war, pursuant to which Respondents claim the authority to detain Petitioners. Thus, the relevance of the Geneva Conventions is not solely to provide *Petitioners* a "source of rights," but is instead as an integral part of the legal

authority – the "source of rights" – Respondents rely upon to detain Petitioners.

Finally, if section 5 applies to these cases, it is unconstitutional. First, assuming that the Suspension Clause, U.S. CONST. art. I, § 9, cl. 2, protects the Guantánamo detainees, there is no question that the Clause embraces the central claims of Petitioners in these cases – namely, that their detention is in violation of treaty. Nor is there any doubt that the remedy provided by the DTA and MCA for Petitioners' treaty-based claims does not constitute an adequate, effective substitute for habeas. *See Swain* v. *Pressley*, 430 U.S. 372 (1977). Instead, because the Suspension Clause, at the absolute minimum, protects the writ of habeas corpus as it existed in 1789, preclusion of judicial consideration of a treaty-based claim of unlawful detention is inconsistent with the Clause, and is therefore unconstitutional.

Even if section 5 does not violate the Suspension Clause, it violates the separation of powers by requiring the courts to decide these cases "in a manner repugnant to the text, structure, and traditions of Article III." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995). Specifically, the provision violates the separation-of-powers rule articulated in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), by leaving applicable substantive law intact while still commanding the courts not to consider certain legal claims. Congress has the authority to alter the applicable substantive law and to have that change apply to pending cases. *Klein* precludes Congress, however, from rendering otherwise applicable substantive law unenforceable in a defined subset of cases. Thus, if applied to these cases, section 5 would be unconstitutional.

ARGUMENT

I. As *Hamdan* Recognized, the Geneva Conventions Can Be Enforced by the Guantánamo Detainees

a. Habeas Corpus Has Historically Been Available to Individuals Detained in Violation of Treaty-Based Rights

Since their inception, the federal courts have had the power to entertain treaty-based habeas petitions. As a statutory matter, such authority was codified by Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385, 385. The modern version of the Act provides that the writ of habeas corpus shall extend, *inter alia*, to petitioners alleging that they are "in custody in violation of the Constitution or laws *or treaties* of the United States." 28 U.S.C. § 2241(c) (emphasis added); *see, e.g.*, *Wildenhus's Case*, 120 U.S. 1 (1887). *See generally Felker* v. *Turpin*, 518 U.S. 651, 659-60 (1996) (summarizing the evolution of the federal habeas statute).

Well before the 1867 Act, however, both the federal and state[5] courts routinely exercised jurisdiction over treaty-based wrongful detention claims. *See, e.g.*, *United States* v. *Laverty*, 26 F. Cas. 875 (D. La. 1812) (No. 15,569a) (granting relief to detained enemy aliens on the

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[5] Prior to *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872), and *Ableman* v. *Booth*, 62 U.S. (21 How.) 506 (1859), it was well established that state courts could entertain federal habeas petitions, and that the Supreme Court could review such decisions via writs of error. *See, e.g.*, ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 18 & 159 n.21 (2001); *see also* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 126-35 (1980) (arguing that the Suspension Clause was originally designed to protect against congressional interference with federal habeas petitions in *state* court).

basis of provisions in the Louisiana Purchase Treaty). Indeed, section 14 of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, provided

> That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment.

Id. § 14, 1 Stat. at 82. Section 14 thereby conferred jurisdiction on the federal courts to inquire into the cause of confinement of federal prisoners raising *any* claim "agreeable to the principles and usages of law." Given the sweeping range of non-criminal detention claims that were cognizable at common law,[6] section 14 necessarily conferred upon the federal courts the power to hear treaty-based habeas claims by federal prisoners.[7] Thus, even before the 1867 Habeas Corpus Act, it was generally accepted that treaties could form the basis for habeas relief to the same extent as statutes and the federal Constitution.

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[6] *See generally* Jonathan L. Hafetz, Note, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2522-23 & nn.103-04 (1998) (surveying the scope of the common-law writ at the time of the Founding).

[7] The significance of the 1867 Act, then, was to extend the availability of treaty-based habeas claims (as well as constitutional and statutory claims) to individuals in state custody.

The availability of habeas for treaty-based claims is entirely consistent with – and indeed compelled by – the Constitution's Supremacy Clause, which places treaties alongside statutes and the Constitution as "the supreme Law of the Land." U.S. CONST. art. VI, cl. 2; *see, e.g.*, *Maiorano* v. *Balt. & Ohio R.R. Co.*, 213 U.S. 268, 272-73 (1909); *Owings* v. *Norwood's Lessee*, 9 U.S. (5 Cranch) 344, 348 (1809) (statement of Marshall, C.J.).

It is undisputed that the principal historical office of the writ of habeas corpus has been as a bulwark against *all* unlawful executive detention. *See, e.g.*, *Smith* v. *Bennett*, 365 U.S. 708, 712-13 (1961) ("Over the centuries it has been the common law world's 'freedom writ' by whose orderly processes the production of a prisoner in court may be required and the legality of the grounds for his incarceration inquired into, failing which the prisoner is set free."). The conclusion that habeas extends as fully to treaty-based claims as it does to claims based upon the Constitution and federal statutes is beyond question.

It is true that various lower courts have concluded – often summarily – that habeas is not available to enforce rights conferred by "non-self-executing" treaties. *See, e.g.*, *Bannerman* v. *Snyder*, 325 F.3d 722 (6th Cir. 2003); *Wesson* v. *U.S. Penitentiary*, 305 F.3d 343 (5th Cir. 2002); *Hain* v. *Gibson*, 287 F.3d 1224 (10th Cir. 2002); *Garza* v. *Lappin*, 253 F.3d 918 (7th Cir. 2001). Even assuming that the Geneva Conventions are "non-self-executing,"[8] it is well

[8] *Amici* do not concede this point, and there is good reason to conclude that the Conventions – or at least their relevant provisions – *are* self-executing. *See* Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions*, 90 CORNELL L. REV. 97, 123-29 (2004) (suggesting that the relevant provisions of the Geneva Conventions *are*

(Continued on following page)

established that habeas has historically been available to enforce rights under treaties that do not themselves create private rights of action. *See, e.g.*, *Chew Heong* v. *United States*, 112 U.S. 536 (1884) (granting habeas relief to a Chinese laborer based on an 1880 treaty between the United States and China where the treaty did not create a private right of action); *see also* David Sloss, *When Do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue in* Hamdan *and* Sanchez-Llamas, 45 COLUM. J. TRANSNAT'L L. 20, 98-99 (2006) (discussing *Chew Heong*). *See generally Ogbudimkpa* v. *Ashcroft*, 342 F.3d 207, 217-20 & n.22 (3d Cir. 2003) (discussing the availability of habeas corpus to enforce rights conferred by non-self-executing treaties in light of implementing legislation).

Further, the weight of this Court's precedents suggests that claims by petitioners in habeas cases can be analogized to claims by defendants in other civil – and even criminal – lawsuits. *See, e.g.*, *United States* v. *Rauscher*, 119 U.S. 407 (1886). In those contexts, treaties that do not create a private right of action have nevertheless been available as a substantive defense. *See, e.g.*, *Kolovrat* v. *Oregon*, 366 U.S. 187 (1961); *Cook* v. *United States*, 288 U.S. 102 (1933); *Patsone* v. *Pennsylvania*, 232 U.S. 138 (1914); *Carneal* v. *Banks*, 23 U.S. (10 Wheat.) 181 (1825); *Orr* v. *Hodgson*, 17 U.S. (4 Wheat.) 453 (1819); *Moodie* v. *The Ship Phoebe Anne*, 3 U.S. (3 Dall.) 319 (1796); *see also* Amicus Brief of Law Professors Louis Henkin et al. at 9-13, *Hamdan*, 126 S. Ct. 2749 (No. 05-184) (discussing the significance of these cases). *See*

"self-executing" in the sense that they are the "Law of the Land" pursuant to the Supremacy Clause).

generally Sloss, *supra*, at 51-91 (exhaustively tracing the history of cases in which the Supreme Court considered the enforceability of treaties).

Thus, unless a non-self-executing treaty is not a "treaty" for purposes of 28 U.S.C. § 2241(c) and the Supremacy Clause – a proposition without any support in the case law – habeas otherwise remains available as a remedy to detainees alleging violations of their treaty-based rights.[9]

b. Even If the Geneva Conventions Are Non-Self-Executing, Congress Has, as *Hamdan* Concluded, Implemented the Obligations Relevant to Petitioners' Claims

This Court recognized in *Hamdan* that Congress has implemented the United States' obligations under the Geneva Conventions here relevant. *See Hamdan*, 126 S. Ct. at 2794 ("[R]egardless of the nature of the rights conferred on Hamdan, they are, as the Government does not dispute, part of the law of war. And compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted." (citations omitted)). Although the MCA purports to preclude the private judicial enforceability of the Geneva Conventions, *see, e.g.*, MCA § 5, 120 Stat. at 2631, various other provisions of the MCA reinforce this Court's conclusion in *Hamdan* that the

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[9] Of course, as with constitutional and statutory rights, the availability of the writ to vindicate treaty-based rights can be made subject to generalized procedural limitations. *See, e.g.*, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (holding that state procedural default rules applied to preclude habeas claims brought under the Vienna Convention on Consular Relations).

Geneva Conventions are – and remain – an integral and inseparable component of the "laws of war."

In evaluating the United States' implementation of the Geneva Conventions, it cannot be overemphasized that Respondents have steadfastly maintained that it is the laws of war from which the government has derived its authority to conduct military commissions (as in *Hamdan*) and to detain "enemy combatants" without trial (as in the instant cases). Because the crux of Respondents' argument is that the detention of Petitioners is recognized and justified by the laws of war, such an argument necessarily presupposes that the Authorization for the Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001), incorporates that same body of law. As Justice O'Connor summarized in *Hamdi*,

> Because the [AUMF] authorizes the use of military force in acts of war by the United States, the [government's] argument goes, it is reasonably clear that the military and its Commander in Chief are authorized to deal with enemy belligerents according to the treaties and customs known collectively as the laws of war. Accordingly, the United States may detain captured enemies, and *Ex parte Quirin* may perhaps be claimed for the proposition that the American citizenship of such a captive does not as such limit the Government's power to deal with him under the usages of war. Thus, the Government here repeatedly argues that Hamdi's detention amounts to nothing more than customary detention of a captive taken on the field of battle: if the usages of war are fairly authorized by the [AUMF], Hamdi's detention is authorized for purposes of [18 U.S.C.] § 4001(a).

542 U.S. at 548-49 (plurality opinion) (citations omitted); *see also id.* at 520 (incorporating principles of the laws of war into an analysis of the government's authority to detain "enemy combatants" until the cessation of hostilities).[10] The only question, then, is whether the MCA subsequently rejected the implementation of the laws of war enmeshed within the AUMF and recognized first in *Hamdi* and later in *Hamdan*.

The answer is "no." As this Court has emphasized, "[t]here is . . . a firm and obviously sound canon of construction against finding an implicit repeal of a treaty in ambiguous congressional action." *See Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 252 (1984). Nothing in the MCA explicitly repeals the Geneva Conventions. More than that, though, the statute dispels the notion that Congress even implicitly sought to override the Geneva Conventions.

For example, section 6, titled "Implementation of Treaty Obligations," sets out in painstaking detail the extent to which violations of the Geneva Conventions remain actionable pursuant to the War Crimes Act, 28 U.S.C. § 2441. Moreover, the version of section 5 – the provision purporting to restrict the enforceability of the Geneva Conventions – enacted by Congress was substantially narrower than that proposed by the Administration.

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[10] Although the MCA provides separate authorization for trials by military commission, *see* MCA §§ 2-3, 120 Stat. at 2600-02, it pointedly does not provide separate authorization for the detention of "enemy combatants" without trial. Such authorization, if it exists, must come from the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001), which necessarily incorporates the laws of war. *See, e.g.*, *Hamdi*, 542 U.S. at 548-49.

See, e.g., Carlos Manuel Vázquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 AM. J. INT'L L. 73, 74 & nn.9-10, 93 & n.123 (2007). As Professor Vázquez explains,

> the provisions ultimately enacted do not purport to prohibit the "indirect" invocation of the Geneva Conventions and Protocols, and they do not purport to bar the invocation of these instruments in criminal prosecutions against citizens and lawful enemy combatants or in civil actions against private or foreign defendants. [The Administration proposal] would apparently have barred the invocation of the Conventions in all those circumstances.

Id. at 74 n.10.

In addition, new 10 U.S.C. § 948b(f) provides that "[a] military commission established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions." MCA § 3(a), 120 Stat. at 2602. Had Congress intended in the MCA to "un-implement" or otherwise repudiate the United States' treaty obligations under the Geneva Conventions, it would not have included so many measures attempting to conform U.S. law to the myriad obligations imposed by the Geneva Conventions.

Instead, these provisions in the Act, taken together, make clear that Congress's intent was *not* to "un-execute" the Geneva Conventions, or to "un-implement" the treaty obligations that this Court identified in *Hamdan*. *See generally* Vázquez, *supra*, at 76-92. To the contrary, Congress's clear decision not to override the Geneva Conventions *en toto* suggests that the United States' treaty

obligations remain in force, subject to whatever permissible limits the MCA imposes on their enforceability.

II. Section 5 of the Military Commissions Act Does Not Apply to These Cases

a. Section 5 Does Not Apply to Pending Cases

As quoted above, the relevant portion of section 5 of the MCA purports to preclude any litigant from "invok[ing] the Geneva Conventions . . . in any habeas corpus or other civil action or proceeding . . . as a source of rights in any court of the United States or its territories." MCA § 5(a), 120 Stat. at 2631.[11] The first question the Court must decide is whether section 5's prohibition even applies to cases, such as these, pending on the date of enactment of the MCA.

i. Section 5 Is Ambiguous as to Whether It Applies to Pending Cases

Section 5 is silent as to whether it applies to pending cases.[12] This silence becomes all the more significant when

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[11] A second provision of the MCA, new 10 U.S.C. § 948b(g), also purports to preclude the judicial enforceability of the Geneva Conventions. *See* MCA § 3(a), 120 Stat. at 2602 ("No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights."). Although the provision applies on its face to any "alien unlawful enemy combatant *subject* to trial by military commission," it should be read as only limiting the use of the Geneva Conventions *in* military commission proceedings themselves. *See, e.g.*, Vázquez, *supra*, at 82-92 (making this argument).

[12] This Court has long recognized a presumption against the retroactive application of a statute, absent a clear statement of intent

(Continued on following page)

contrasted with the language of its immediate successor provisions, sections 6 and 7 of the MCA. Section 6(b), which amends the War Crimes Act, 28 U.S.C. § 2441, specifies that:

> The amendments made by this subsection, except as specified in subsection (d)(2)(E) of section 2441 of title 18, United States Code, shall take effect as of November 26, 1997, as if enacted immediately after the amendments made by section 583 of Public Law 105-118 (as amended by section 4002(e)(7) of Public Law 107-273).

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by Congress to give a statute such effect. *See Republic of Austria* v. *Altman*, 541 U.S. 677, 718 (2004) (Kennedy, J., dissenting) ("The single acknowledged exception to the rule against retroactivity is when the statute itself, by a clear statement, requires it."); *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270 (1994) ("Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent."). Thus, statutes are presumed to apply prospectively absent some affirmative indication of congressional intent to the contrary.

Nor is it of any moment that the MCA imposes a new jurisdictional – as opposed to substantive – rule. As this Court has observed in an analogous context:

> Statutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties. Such statutes affect only *where* a suit may be brought, not *whether* it may be brought at all. The 1986 amendment, however, does not merely allocate jurisdiction among forums. Rather, it *creates* jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well. Such a statute, even though phrased in "jurisdictional" terms, is as much subject to our presumption against retroactivity as any other.

Hughes Aircraft Co. v *United States ex rel. Schumer*, 520 U.S. 939, 951 (1997) (citations omitted).

MCA § 6(b)(2), 120 Stat. at 2635. Section 7 similarly includes an express provision regarding its effective date:

> The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, *without exception*, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

Id. § 7(b), 120 Stat. at 2636 (emphasis added). Section 7 manifests Congress's intent that at least some[13] pending cases also fall within the scope of the otherwise prospective jurisdictional preclusion.

Given Congress's unequivocal intent to apply the amendments to the War Crimes Act in section 6(b) retroactively and to apply the jurisdiction-stripping provision in section 7(a) to certain pending cases, the absence of similar language in section 5 is striking, and compels the conclusion that section 5 is at best ambiguous concerning its applicability to pending cases.

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[13] *Amici* take no position as to whether section 7 applies to the instant cases. Whether or not it does, the salient point is that section 7 manifests Congress's intent to apply section 7(a) to at least *some* pending cases, intent that is nowhere evident with respect to section 5.

ii. As in *Hamdan*, "Ordinary Principles of Statutory Construction" Compel the Conclusion that Section 5 Does Not Apply to Pending Cases

The absence of an unambiguous effective date provision in section 5 is particularly telling given the extent to which that precise defect was the dispositive factor in *Hamdan*'s analysis of the Detainee Treatment Act ("DTA"), Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2680, 2739-44 (2005). There, the jurisdictional issue involved section 1005(e)(1) of the DTA, which provided that "no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." *Id.*, 119 Stat. at 2741-42. The question in *Hamdan* was whether the DTA applied to suits (such as *Hamdan* and the instant cases) pending at the time of its enactment.

The majority's analysis focused first on language in the DTA that made sections 1005(e)(2) and (e)(3) applicable to pending cases. *See id.* § 1005(h)(2), 119 Stat. at 2743-44 ("Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act."). The Court then invoked the "familiar principle of statutory construction . . . that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute." 126 S. Ct. at 2765 (citing *Lindh* v. *Murphy*, 521 U.S. 320, 330 (1997)); *see also Field* v. *Mans*, 516 U.S. 59, 75 (1995) ("The more apparently deliberate the contrast, the stronger the inference, as applied, for example, to contrasting statutory

sections originally enacted simultaneously in relevant respects."). Thus, because sections 1005(e)(2) and (e)(3) were both made expressly applicable to pending cases, the absence of similar language with respect to section 1005(e)(1) compelled the conclusion that it only applied prospectively. *See Hamdan*, 126 S. Ct. at 2766-69.[14]

The virtually identical situation is presented here. Of the three MCA provisions that could conceivably affect pending cases, two – sections 6 and 7 – include language expressing Congress's unequivocal intent to have the statute apply retroactively; the third – section 5 – does not. Critically, the MCA was enacted for the express purpose of providing the statutory authority that this Court had found lacking in *Hamdan*. *See, e.g.*, *Boumediene* v. *Bush*, 476 F.3d 981, 986 (D.C. Cir.) ("[O]ne of the primary purposes of the MCA was to overrule *Hamdan*."), *cert. granted*, 127 S. Ct. 3078 (2007) (No. 06-1195). Given that this very defect was central to *Hamdan*'s analysis of the jurisdiction-stripping provision of the DTA, the "negative inference" principle identified in *Lindh* and applied in *Hamdan* has even greater force here. Indeed, it is hard to conceive of a situation in which Congress was legislating more clearly against the backdrop of this Court's precedent.

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[14] Although section 1005(h)(1) of the DTA provided that "[t]his section shall take effect on the date of the enactment of this Act," DTA § 1005(h)(1), 119 Stat. at 2743, the Court in *Hamdan* concluded that such language was not conclusive of its applicability to *pending* cases, since "Congress deemed that provision insufficient, standing alone, to render subsections (e)(2) and (e)(3) applicable to pending cases; hence its adoption of subsection (h)(2)." *Hamdan*, 126 S. Ct. at 2766 n.9. Given that the MCA contains *no* general effective date provision, such an argument is even more persuasive in these cases.

iii. Fundamental Principles of Constitutional Avoidance Compel Interpreting Section 5 So As Not To Apply to Pending Cases

Finally, interpreting section 5 not to apply to pending cases is compelled by the constitutional avoidance canon. Cases invoking the canon make clear that this Court has consistently "avoided passing upon a large part of all the constitutional questions pressed upon it for decision." *Ashwander* v. *TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring); *see also Elk Grove Unified Sch. Dist. No. 1* v. *Newdow*, 542 U.S. 1, 11 (2004). Thus, whenever this Court has been confronted with a statute subject to two plausible interpretations, one of which would raise a constitutional question and one of which would not, it has unhesitatingly adopted the latter reading. *See, e.g.*, *Hooper* v. *California*, 155 U.S. 648, 657 (1895); *Mossman* v. *Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800); *Ex parte Randolph*, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558) (Marshall, C.J.).

On top of the generalized principles of constitutional avoidance articulated by Justice Brandeis in *Ashwander*, this Court has long recognized an even stronger version of the canon in cases implicating the substantive availability of habeas corpus, given what Justice Breyer has described as the "terribly difficult and important constitutional question" of Congress's authority over the courts' habeas jurisdiction. *See* Transcript of Oral Argument at 49, *Hamdan*, 126 S. Ct. 2749, *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-184.pdf.

Thus, in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court interpreted statutory provisions purporting to eliminate the availability of habeas corpus in certain immigration cases not to preclude review, not because

such provisions would be unconstitutional if so applied, but because they might be. *See id.* at 301 n.13 ("The fact that this Court would be required to *answer* the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely." (emphasis added)). *See generally Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 102 (1869). Because the potential preclusion of the enforceability of the Geneva Conventions via habeas raises similarly serious and grave questions under both the Suspension Clause specifically and the separation of powers more generally, *see* Part III, *infra*, section 5 should be construed so as not to raise the constitutional question – and as not applying to pending cases.

b. Section 5 Does Not Apply Insofar as Petitioners Are Not Invoking the Geneva Conventions as a Source of Rights

Finally, even if section 5 applies as a general matter to pending cases, the text of section 5 makes clear that the MCA does not preclude judicial application of the Geneva Conventions in all contexts. *See* Part I.b, *supra*. It merely precludes judicial application of the Geneva Conventions in situations where a "person" invokes the treaties "as a source of rights." There are certain respects in which the Petitioners are invoking the Geneva Conventions in support of their claims, but are not invoking the Geneva Conventions "as a source of rights," as that phrase is used in the MCA.

To clarify this point, it is essential to review the nature of the claims advanced by Respondents in these cases. Respondents claim that there are three sources of

legal authority that authorize Petitioners' detention: the laws of war, the AUMF, and the President's constitutional authority as Commander in Chief, *see* U.S. CONST. art. II, § 2, cl. 1. *See generally Hamdi*, 542 U.S. at 548-49 (plurality opinion). Yet, each of those sources of authority relies, to a large degree, on the laws of war.

First, in evaluating the Respondents' claim that the laws of war authorize Petitioners' detention, the Court cannot disregard the Geneva Conventions because, as recognized in both *Hamdi* and *Hamdan*, the Conventions are an integral part of the laws of war. *See, e.g.*, *Hamdan*, 126 S. Ct. at 2794. Indeed, nothing in the MCA precludes this Court from consulting the Geneva Conventions as a source of legal authority in the context of evaluating the *government's* assertion that the laws of war authorize detention of Petitioners. In this context, Petitioners are not invoking the Geneva Conventions "as a source of rights." Rather, Respondents are invoking the laws of war as a source of legal authority that allegedly authorizes the continued detention of Petitioners, and Petitioners are merely pointing out that the Court cannot evaluate such a claim without consulting the Geneva Conventions.

Second, the MCA does not preclude this Court from consulting the Geneva Conventions in evaluating the government's claim that the AUMF authorizes the continued detention of petitioners. It is a traditional canon of statutory construction that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). This Court has invoked the so-called *Charming Betsy* canon not only to avoid conflicts with customary international law, but also to avoid conflicts with international agreements. *See,*

e.g., *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982). Of course, the *Charming Betsy* canon is not a constitutionally mandated rule of statutory construction. Even so, absent the MCA, this Court would presumably consider, in the context of evaluating the merits of the government's AUMF argument, whether the government's interpretation of the AUMF is consistent with the United States' international legal obligations, including its obligations under the Geneva Conventions. *See, e.g.*, *Hamdi*, 542 U.S. at 520 (looking to the laws of war in interpreting the AUMF). By stipulating in the MCA only that that "no person may invoke the Geneva Conventions . . . as a source of rights," it is clear that Congress did not intend to preclude this Court from consulting the Geneva Conventions in evaluating whether the government's proposed interpretation of the AUMF is consistent with the United States' international legal obligations.

Third, the MCA does not preclude this Court from consulting the Geneva Conventions in evaluating the government's claim that the Commander-in-Chief Clause authorizes continued detention of petitioners. There is substantial authority for the proposition that, on its own, the Commander-in-Chief Clause empowers the President to do no more than exercise the belligerent rights of the United States under the laws of war. *See, e.g.*, *The Prize Cases*, 67 U.S. (2 Black) 635, 668-71 (1863) (holding that while the President "has no power to initiate or declare a war either against a foreign nation or a domestic State," President Lincoln "had a right, *jure belli*, to institute a blockade of ports in possession of the States in rebellion"). In other words, absent legislation, which could in theory authorize the President to act in contravention of the laws of war, the President has no inherent authority as Commander

in Chief to violate the laws of war. *See, e.g.*, Jinks & Sloss, *supra*, at 176-79 (elaborating upon this point). Therefore, in evaluating the government's claim that the Commander-in-Chief Clause authorizes detention of petitioners, it is incumbent upon this Court to determine whether the laws of war – including the Geneva Conventions – authorize detention of the Petitioners.

Finally, this Court should consult the Geneva Conventions in evaluating the merits of the government's claim that the Commander-in-Chief Clause authorizes continued detention of petitioners. After all, the Commander-in-Chief Clause must be construed in harmony with the President's constitutional duty to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. The President's duty under the Take Care Clause includes a duty to act in conformity with U.S. treaty obligations, including U.S. obligations under the Geneva Conventions. *See* Jinks & Sloss, *supra*, at 154-64 (demonstrating that the President's duty under the Take Care Clause includes a duty to take care that treaties are faithfully executed). To fulfill its responsibilities within our system of checks and balances, this Court should ensure that the President exercises his authority as Commander in Chief in a manner that is consistent with his duty to take care that laws and treaties, including the Geneva Conventions, are faithfully executed. By precluding individuals from invoking the Geneva Conventions as a source of rights, the MCA does not preclude this Court from consulting the Geneva Conventions to ensure that the President is complying with his duty to execute U.S. treaty obligations.

III. To the Extent that Section 5 Applies to These Cases and Precludes Consideration of Petitioners' Treaty-Based Claims, It Is Unconstitutional

As this Court has repeatedly emphasized, "[a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed," *Cook*, 288 U.S. at 120, and "[l]egislative silence is not sufficient to abrogate a treaty," *Trans World Airlines*, 466 U.S. at 252. The MCA is not silent, however; it appears plainly to contemplate the continued force of the Geneva Conventions as U.S. law. *See* Part I.b, *supra*. Consequently, the Geneva Conventions remain treaties of the United States for purposes of the Supremacy Clause of Article VI and 28 U.S.C. § 2241(c). Section 5 of the Military Commissions Act therefore does not effect a change of the underlying substantive law, but only purports to limit its enforceability.

a. "At the Absolute Minimum," the Suspension Clause Protects Treaty-Based Habeas Claims by Federal Prisoners

Assuming, as Petitioners argue, that the D.C. Circuit's conclusion that the Suspension Clause does not "apply" to the Guantánamo detainees was erroneous, the central question becomes what, exactly, the Suspension Clause protects. This Court has traditionally sidestepped questions as to the substantive scope of the Suspension Clause. *See, e.g.*, *St. Cyr*, 533 U.S. at 301 n.13. The Court has made clear, however, that "regardless of whether the protection of the Suspension Clause encompasses all cases covered by the 1867 [Habeas Corpus Act] extending the protection of the writ to state prisoners, or by subsequent

legal developments, at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *Id.* at 300-01 (quoting *Felker*, 518 U.S. at 663-64 (citations omitted)).

"At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *St. Cyr*, 533 U.S. at 301. And as Chief Justice Burger wrote for himself, Justice Blackmun, and Justice Rehnquist in *Swain* v. *Pressley*, 430 U.S. 372 (1977), "at common law, the writ was available (1) to compel adherence to prescribed procedures in advance of trial; (2) *to inquire into the cause of commitment not pursuant to judicial process*; and (3) to inquire whether a committing court had proper jurisdiction." *Id.* at 385 (Burger, C.J., concurring in part and concurring in the judgment) (emphasis added); *see also Brown* v. *Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in the result) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial."). Thus, in protecting the writ, at bottom, "as it existed in 1789," the Suspension Clause encompasses claims by federal prisoners that their detention without judicial process is in violation of a treaty.

b. Precluding Judicial Consideration of Claims that Individuals Are Detained in Violation of a Treaty Violates the Suspension Clause

That the Suspension Clause encompasses claims by federal prisoners that their detention without judicial process is in violation of a treaty is only one question. The question remains whether section 5, in purporting to

preclude the invocation of the Geneva Conventions as "a source" for the claim of unlawful detention, violates the Suspension Clause.[15]

To ask the question is to answer it. As *Swain* suggests, the Suspension Clause compels the existence of *some* remedy for claims encompassed by the Clause, *see* 430 U.S. at 381-82, and that remedy will only satisfy the Suspension Clause if it is not "inadequate" or "ineffective," *see id.* The DTA provides a substitute remedy for Petitioners' statutory and constitutional claims, but the adequacy and effectiveness of that remedy is still very much at issue. *See, e.g.*, *Bismullah* v. *Gates*, No. 06-1197, 2007 WL 2067938 (D.C. Cir. July 20, 2007)). In any event, the DTA does not appear affirmatively to create a substitute remedy for Petitioners' treaty-based claims,[16] and section 5 of the MCA purports to preclude such a remedy altogether.[17]

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[15] Petitioners, particularly in *Al Odah*, assert a host of claims under the Geneva Conventions. *See* Brief of International Humanitarian Law Experts as *Amici Curiae* in Support of Petitioners. Some of the claims are more analogous to challenges to the conditions of the Petitioners' confinement, and not to the confinement itself. *Amici* recognize that there is an open question whether such claims, to the extent they fall outside the "core" of habeas corpus, are protected by the Suspension Clause. *Cf. Nelson* v. *Campbell*, 541 U.S. 637, 643-44 (2004) (citing *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973)). The difficulties inherent in resolving this question further bolster the argument that section 5 should be interpreted so as not to apply to these cases. *See* Part II, *supra*.

Even assuming, for the sake of argument, that the Suspension Clause protects only the Petitioners' challenge to the lawfulness of their detention, section 5's preclusion of Petitioners' challenge to the conditions of their confinement would still violate the separation of powers, as discussed below. *See* Part III.c, *infra*.

[16] Section 1005(e)(2)(C)(2) of the DTA, for example, authorizes challenges to Combatant Status Review Tribunals based upon the

(Continued on following page)

Unless section 5 is read so as not to apply to Petitioners' cases, *see* Part II, *supra*, its plain language mandates that "[n]o person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action . . . as a source of rights in any court of the United States or its States or territories." MCA § 5(a), 120 Stat. at 2631. This, Congress cannot do. If the Suspension Clause protects the Guantánamo detainees, and if section 5 of the MCA applies to pending cases and precludes judicial consideration of Petitioners' treaty-based unlawful detention claims, then section 5 violates the Suspension Clause.[16]

Constitution and "laws" of the United States, but *not* treaties. *See* DTA § 1005(e)(2)(C)(2), 119 Stat. at 2742.

[17] This point bears further elaboration: If the Suspension Clause *does* apply to the Guantánamo detainees, but the remedy provided by the DTA and MCA for Petitioners' statutory and constitutional claims *is* "adequate" and "effective" per *Swain*, that still leaves the question whether the MCA's preclusion of the Petitioners' treaty-based claims violates the Suspension Clause. That is to say, even if section 7 is compatible with the Suspension Clause, it is possible – and, as *amici* argue, likely – that section 5 is not.

[18] Of course, a separate argument could be made that section 5 is a constitutional suspension of habeas corpus. Such an argument, however, is a non-starter. *See, e.g.*, *Hamdan* v. *Rumsfeld*, 464 F. Supp. 2d 9, 16 (D.D.C. 2006) ("Neither rebellion nor invasion was occurring at the time the MCA was enacted. Indeed, Congress itself must not have thought that it was 'suspending' the writ with the enactment of the MCA, since it made no findings of the predicate conditions, as it did when it approved [President] Lincoln's suspension in the Civil War and each of the subsequent suspensions in Mississippi, the Philippines, and Hawaii.").

c. Precluding Judicial Consideration of the Petitioners' Treaty-Based Claims Violates the Separation of Powers

Finally, and separate from its incompatibility with the Suspension Clause, section 5 unconstitutionally infringes upon the separation of powers by requiring the federal courts to exercise their jurisdiction "in a manner repugnant to the text, structure, and traditions of Article III." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995); *cf. Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 546 (2001) (invalidating a restriction on attorney speech because, *inter alia*, the restriction "threatens severe impairment of the judicial function"). Two different types of legislation can offend the separation of powers in this manner. *See Plaut*, 531 U.S. at 546. Whereas the second category identified by Justice Scalia in *Plaut* (legislation vesting review of final Article III judgments in other branches of the federal government) is not at issue here, the first category – the prohibition on Congress's prescription of "rules of decision" first enunciated in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 146 (1872) – is squarely on point.

Justice O'Connor has summarized *Klein* as follows:

> Klein, the executor of the estate of a Confederate sympathizer, sought to recover the value of property seized by the United States during the Civil War, which by statute was recoverable if Klein could demonstrate that the decedent had not given aid or comfort to the rebellion. In *United States* v. *Padelford*, we held that a Presidential pardon satisfied the burden of proving that no such aid or comfort had been given. While Klein's case was pending, Congress enacted a statute providing that a pardon would instead be taken

> as proof that the pardoned individual had in fact aided the enemy, and if the claimant offered proof of a pardon the court must dismiss the case for lack of jurisdiction. We concluded that the statute was unconstitutional because it purported to "prescribe rules of decision to the Judicial Department of the government in cases pending before it."

Miller v. *French*, 530 U.S. 327, 348-49 (2000) (quoting *Klein*, 80 U.S. (13 Wall.) at 146) (other citations omitted)); *see also Loving* v. *Virginia*, 517 U.S. 748, 757 (1996).

In more recent cases, including *Miller*, this Court has clarified that *Klein*'s prohibition on congressional interference with judicial decisionmaking "does not take hold when Congress 'amend[s] applicable law.'" *Plaut*, 514 U.S. at 218 (quoting *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992)) (emphasis in original). Such a result is fundamentally necessary and unproblematic, since Congress has the unquestioned power to define the substantive scope of sub-constitutional federal law. *Cf. Miller*, 530 U.S. at 343-45 (holding that Congress can change the substantive law underlying injunctions without violating Article III). As such, an Act that overrides or otherwise amends the Geneva Conventions would not violate the *Klein* principle; it would merely alter the substantive law at issue in the instant cases.

But, as discussed in detail above, *see* Part I.b, *supra*, the MCA does *not* "amend applicable law" because it does not override, "un-execute," or "un-implement" the United States' treaty obligations under the Geneva Conventions. Every relevant indication is that the MCA further codifies the United States' treaty obligations, rather than subverting or vitiating them, and that Congress relied upon the

laws of war (in conjunction with the AUMF) as providing underlying substantive authority for the detention of the Petitioners – something the MCA itself does not provide. This kind of bait-and-switch is precisely what *Klein* prohibits: Congress can change the applicable substantive law and have that change apply to pending cases, but Congress cannot leave the relevant substantive law intact and merely render it nugatory in a defined subset of cases. *See* Vázquez, *supra*, at 86 ("Congress may limit the jurisdiction of the courts, but it cannot give them jurisdiction and instruct them to decide the case without regard to applicable federal law.").

Instead, section 5 is the paradigm *Klein* statute, for it tells the courts what they can and cannot do *without* rewriting the underlying substantive law. Whatever lingering confusion remains as to the scope of *Klein*'s prohibition, *see generally* Lawrence G. Sager, Klein's *First Principle: A Proposed Solution*, 86 GEO. L.J. 2525 (1998), such non-substantive congressional interference with judicial decisionmaking must fall squarely within its bounds if it is to mean anything. *See, e.g.*, *Schiavo ex rel. Schindler* v. *Schiavo*, 404 F.3d 1270, 1272-75 (11th Cir. 2005) (Birch, J., specially concurring in the denial of rehearing en banc) (discussing *Klein*).[19] Thus, because section 5 of the MCA leaves the Geneva Conventions substantively intact as U.S. law, its preclusion of judicial review of claims under the Geneva Conventions runs

[19] This conclusion may further buttress the argument, made in far more detail by the Petitioners, that section 7 of the MCA is unconstitutional. For even if the Court of Appeals was correct that the Suspension Clause does not protect the Guantánamo detainees, there are, as *Hamdan* makes clear, no concomitant territorial limitations on the separation of powers.

directly contrary to the fundamental separation-of-powers principle articulated in *Klein*, and is therefore unconstitutional.

CONCLUSION

For the foregoing reasons, the Geneva Conventions are enforceable in the U.S. courts notwithstanding section 5 of the Military Commissions Act, and Petitioners are entitled to habeas relief if their detention is in violation thereof.

Respectfully submitted,

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